Supreme Court, U.S.
FILED
APR 20 1993
OFFICE OF THE CLERK

No. 92-1506

In The

Supreme Court of the United States

October Term, 1992

CITY OF LAWRENCEVILLE, GEORGIA; BARTOW JENKINS, Mayor; SONNY BRAND, MAHLON BURSON, RAY OAKES, and G. MICHAEL CROW, SR., Members of the City Council for the City of Lawrenceville, Georgia; and BRADFORD P. LEONARD, Director, Planning, Zoning and Inspections,

Petitioners,

vs.

GWINNETT 316 ASSOCIATES, a Georgia General Partnership,

Respondent.

Response To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

RICHARD W. WILSON, JR.*
JOEL L. LARKIN
PETERSON DILLARD YOUNG SELF & ASSELIN
Suite 1100
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 523-3300
Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioners omit facts in their statement of the Question Presented that are material to the finding of an unconstitutional taking by the state courts. A more accurate statement of the issue is as follows: Whether under the Takings Clauses contained in either the Constitution of the State of Georgia or the United States Constitution, a city may require a developer who has previously obtained city approval of its plan of development to deviate from its plan by requiring the reservation, dedication, and conveyance to the public, without compensation, of eighteen acres of right of way for a subsequently planned, unrelated, unfunded, unscheduled, high speed, limited access highway that would destroy the developer's use of over ninety acres of land in addition to eighteen acres of right of way land.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Statement of the Facts 2

Statement of the Course of the Proceedings 7

SUMMARY OF THE ARGUMENT 9

REASONS TO REJECT THE PETITION 11

I. THE STATE COURT DECISIONS EXPRESSLY REST ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS 11

II. PETITIONERS HAVE FAILED TO INDICATE ANY REASON FOR THIS COURT TO OVERRULE THE FACTUAL FINDINGS OF THE STATE COURTS 13

III. THE STATE COURTS DID NOT ERR IN HOLDING THAT PETITIONERS HAD TAKEN GWINNETT 316'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 15

A. The City's Subdivision Regulations Caused a Regulatory Taking of Gwinnett 316's Property Interests 17

TABLE OF CONTENTS – Continued

Page

1. The Subdivision Regulations did not substantially advance a legitimate state interest 18

2. The Subdivision Regulations deprived Gwinnett 316 of all economically viable use of its land comprising the eighteen acres of right of way and the surrounding ninety acres remaining to be developed ... 23

B. The Subdivision Regulations Effect a Taking of Gwinnett 316's Land Under a Physical Invasion Analysis 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960).....16, 21

Braxton v. United States, 111 S. Ct. 1854 (1991)..... 11

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)..... 14

Denton v. Con-Way Southern Express, Inc., 402 S.E.2d 269 (Ga. 1991)..... 11

Fox Film Corp. v. Maller, 296 U.S. 207 (1935)..... 11

Griffith v. C&E Builders, Inc., 200 S.E.2d 874 (Ga. 1973)..... 26

Grissom v. Gleason, 418 S.E.2d 27 (Ga. 1992)..... 11

Hernandez v. New York, 111 S. Ct. 1859 (1991)..... 14

Inner Visions, Ltd. v. City of Smyrna, 400 S.E.2d 915 (Ga. 1991)..... 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 27

Kinney v. Brown, 216 S.E.2d 798 (Ga. 1975).....26, 27

Klinger v. Missouri, 80 U.S. 257 (1871)..... 11

Lamar Advertising v. City of Albany, 389 S.E.2d 1216 (Ga. 1990)..... 12

Lloyd A. Fly Roofing Co. v. Wood, 344 U.S. 157 (1982)..... 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....17, 27

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)..... 23

Michigan v. Long, 463 U.S. 1032 (1983)..... 11

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ..... *passim*

Northpark Assocs. No. 2 v. Homart Dev. Co., 414 S.E.2d 214 (Ga. 1992) 26

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 17, 25

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) 18

WMM Properties, Inc. v. Cobb County, 339 S.E.2d 252 (Ga. 1986) 12

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 16, 21, 22

Yee v. City of Escondido, California, 112 S. Ct. 1522 (1992) 17, 25

CONSTITUTIONAL AUTHORITY

Ga. Const. of 1983, art. I, § 3, ¶ 1 2

U.S. Const., amend. V 18, 23

U.S. Const., amend. XIV 18, 23

OTHER AUTHORITIES

City of Lawrenceville Subdiv. Reg. of 1986 ..... *passim*

City of Lawrenceville Subdiv. Reg., amend. of July 16, 1990 4

U.S. Sup. Ct. R. 10.1 ..... 15, 16

No. 92-1506

In The

Supreme Court of the United States

October Term, 1992

CITY OF LAWRENCEVILLE, GEORGIA; BARTOW JENKINS, Mayor; SONNY BRAND, MAHLON BURSON, RAY OAKES, and G. MICHAEL CROW, SR., Members of the City Council for the City of Lawrenceville, Georgia; and BRADFORD P. LEONARD, Director, Planning, Zoning and Inspections,

Petitioners,

vs.

GWINNETT 316 ASSOCIATES, a Georgia General Partnership,

Respondent.

Response To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Gwinnett 316 Associates, a Georgia General Partnership (hereinafter "Gwinnett 316"), respectfully submits its Response to the Petition for Writ of Certiorari of Petitioners City of Lawrenceville (hereinafter the "City"), Bartow Jenkins, Sonny Brand, Mahlon Burson, Ray

Oakes, G. Michael Crow, and Bradford P. Leonard (hereinafter all collectively referred to as "Petitioners").

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners omit to inform the Court that Gwinnett 316's constitutional challenges were primarily based on the Georgia Constitution's Takings Clause. Ga. Const. of 1983, art. I, § 3, ¶ 1. This paragraph provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." *Id.*

STATEMENT OF THE CASE

Statement of the Facts

Contrary to the overstatements in the Petition, the decisions in this case did not undermine the ability of local governments to plan future road systems. The facts as presented in the Petition are in varying respects inaccurate and incomplete versions of the facts as tried in the state courts and omit the core facts upon which the state courts' decisions were generated. (*See* Final Order and Judgment [hereinafter "Order"] at 1-6, Petition App. B at 2a-6a.) Indeed, most of the facts contained in the Petitioner's Statement of the Case are lifted from the self-serving, nonbinding findings of fact issued by the Petitioners after the trial court remanded the case to the City for reconsideration. (*See* Petition App. E.) Accordingly,

because Gwinnett 316 disputes all facts or the characterizations of the facts contained in Petitioners' Statement of the Case, it is necessary for Gwinnett 316, pursuant to this Court's Rules, to make its own, detailed Statement of the Case.

An account of the history of Gwinnett 316's development and the purpose of the proposed loop road (hereafter the "Loop Road") to alleviate general, growth-related traffic problems in Gwinnett County (hereafter the "County"), and the history of the application of the Subdivision Regulations by the City is necessary to evaluate the Petition's merits.

Gwinnett 316 owns 342 acres of property (hereinafter the "Property") in Gwinnett County, Georgia, which is in the Atlanta, Georgia metropolitan area. The Property was purchased in 1985 by Gwinnett 316 to create an industrial distribution warehouse development in a Heavy Manufacturing zoning district. (Transcript of the Proceedings in Civ. Act. File No. 90-A07060-3 [hereinafter "T1"] at 68; Transcript of the Proceedings of January 24, 1992 in Civ. Act. File No. 91A-5023-3 [hereinafter "T3"] at 57.) The City approved Gwinnett 316's sketch plat for development in 1985, and since then Gwinnett 316 has been building, leasing, and selling distribution warehousing and light manufacturing buildings on the Property. (T1. 69.) The buildings Gwinnett 316 specializes in constructing range, for the most part, between 100,000 and 400,000 square feet. (T1. 69.) Except for approved minor deviations, Gwinnett 316 has not deviated from its plat approved in 1985. (T1. 72-73.)

The Subdivision Regulations were adopted *after* Gwinnett 316 began to develop the Property and *after* approval of its sketch plat for development. The first version of the Subdivision Regulations was adopted in 1986. The Subdivision Regulations in current form require a developer who is seeking the right to develop its property and to locate buildings thereon to first submit and obtain approval of a sketch plat showing roads in the proposed subdivision. *See* Subdiv. Reg. §§ 2.1, 4.1, & 5.2, (Transcript of Civil Hearing in Civil Action File Number 91A-502303 [hereinafter "T2"] at 54-55, 63, & 69-71.) The procedure set forth in article IV of the Subdivision Regulations provides that no permit for construction in a proposed subdivision can be issued until an application to subdivide has been submitted and approved according to all requirements. (T2. 63-67.) Section 1.12 prohibits the issuance of a building permit if the proposed construction involves property subdivided in violation of the Subdivision Regulations. (T2. 53.)

The Subdivision Regulations further require all persons seeking development approval to reserve any and all proposed rights-of-way shown on the Gwinnett County Long Range Road Classification Map (hereinafter "Road Classification Map"), whether or not the roads relate to the needs of the development in any way and regardless of whether or not the proposed roads will ever be built. Also, *all* roads shown on the Road Classification Map must be dedicated to the public. *See* Subdiv. Reg., amend. of July 16, 1990, § III(a), (T2. 102); Subdiv. Reg.

§ 7.2.1.A.14, (T2. 86.).[1] Under any reading of the Subdivision Regulations, Gwinnett 316 can never build in any way either on the physical location of the proposed right of way for the Loop or in any manner which may conflict with the proposed right of way. The proposed Loop was placed on the Road Classification Map after the Subdivision Regulations were adopted and after the original development sketch plat was approved. (T3. 143-46.) Neither can Gwinnett 316 make any use of its surrounding land until the Loop Road is reserved on a sketch plat.[2]

The Subdivision Regulations are an uncommon example of the common practice by local governments of requiring specific road improvements as a condition of building permit approvals. Unlike the application of common road dedication requirements, however, these Subdivision Regulations were applied to require Gwinnett 316 to reserve and publicly dedicate a road that is not related to Gwinnett 316's development. The trial court rejected Petitioners' assertions that the Loop was somehow related to Gwinnett 316's development, finding as follows:

---

[1] Article III(d) of the July 16, 1990 amendment to the Subdivision Regulations also contains the reservation requirement that any street shown on the Road Classification Map must be reserved and set out on the owner's development plans submitted for approval to the City.

[2] One version of the Subdivision Regulations in effect before the trial court remanded the case to the Mayor and City Council required Gwinnett 316 to *build* the Loop, (T2. 81; T3. 144-46 & 463), but after the trial court remanded the case to Petitioners for reconsideration, the Mayor and City Council rescinded this provision before the case returned to the trial court, (T2. 106.)

> The Lawrenceville Loop is unfunded and unscheduled for complete development and neither the City of Lawrenceville nor Gwinnett County have sufficient funds currently available for the purchase of the Loop right-of-way and construction of the road within Plaintiff's property. . . . The right-of-way for the Loop road constitutes approximately 18.5 acres of land, which bisects Phase II of the property, and Plaintiff has been denied the use of its property for more than two (2) years. The refusal to approve the submitted sketch plat has impacted more than 90 additional acres of Plaintiff's property by rendering it undevelopable as a result of the serpentine shape of the proposed Loop and its proposed location along a ridge line within Gwinnett 316. As a result of the location and elevation of the proposed Loop road and the topography of Gwinnett 316, truck traffic would not be able to safely access a substantial portion of the development. Additionally, the approved plan for the Loop road provides for four lanes and a median as the road traverses Plaintiff's property. There are no median cuts or access points from the Loop road to the Gwinnett 316 property on the plan for the Loop road which has been approved.

(Order at 5-6, Petition App. at 5a-6a.) The Loop Road as planned would cost Gwinnett 316 over eight million dollars ($8,000,000.00), making it disastrous for the development. (T1. 79 & 83; T3. 53-54, & 87.) The Loop Road's right of way effectively destroys Gwinnett 316's use of the right of way land plus ninety additional acres without providing road service to Gwinnett 316.

The real purpose for the Petitioners' imposition of the Loop Road conditions was found to be as follows: "The plan for the Lawrenceville Loop arose from the general increase in traffic in Gwinnett County and the City of Lawrenceville. The public need for the Loop was not created by the development of Gwinnett 316 for industrial warehouse development." (Order at 6, Petition App. at 6a.)

The notable mischaracterizations of the facts by Petitioners are further exemplified in the very first footnote in the Petition in which Petitioners allege that Gwinnett 316 "insisted" that the Loop Road be placed on the Road Classification Map. (Petition at 3 n.l.) Gwinnett 316 did initially attempt to work with Petitioners in arriving at a mutually agreeable plan for the Loop Road, but any alleged "enthusiasm" Gwinnett 316 may have exhibited towards the Loop occurred before Gwinnett 316 was informed that Petitioners expected Gwinnett 316 to donate its land and to build, without compensation, a high speed, limited access highway that would not service traffic created by Gwinnett 316 and that would destroy further development plans. When the City amended its Subdivision Regulations in 1989, the City's confiscatory purpose became clear. (T1. 70, 74, 104, 63-65, 107, 83, 85, & 116; T3. 51, 75, 81, 144-46, 383, & 384.)

Statement of the Course of the Proceedings

After several years of attempting to negotiate with Petitioners, Gwinnett 316 filed its first complaint in civil action file number 90-A-07060-3 on December 11, 1990. (R. 490-502.) Petitioners had rejected Gwinnett 316's first

sketch plat because it did not show the Loop Road's right of way, (T3. 82 & T1. 84), and had rejected a second sketch plat because the proposed Phase II development conflicted with the proposed Loop. (Gwinnett 316 had revised the first plat and had resubmitted it showing the Loop Road superimposed over the development.) (T1. 85.)

On March 27, 1991, the trial court remanded the case for Petitioners' reconsideration to clarify the reason for the denial. (R. 626-27.) Gwinnett 316 again resubmitted its sketch plat without the Loop Road. (*See* T3. 395). After the resubmitted sketch plat was rejected, (T3. 408 & 586-87; T1. 83), Gwinnett 316 then submitted a sketch plat showing the Loop Road superimposed on the development; this plat was also rejected, (T2. 82 & 589). This time the Mayor and City Council made findings of fact and conclusions of law as required by the trial court's Order of March 27, 1991 that revealed their reasons for denial of the sketch plat, and Gwinnett 316 renewed its suit and filed a second complaint, (R. 18-35.)[3]

After the trial court declared the Subdivision Regulations unconstitutional and issued a writ of mandamus,

---

[3] Petitioners admitted the sketch plats were denied because an unencumbered right-of-way was not reserved exclusively for the public on the plats. But for the existence of the Loop Road on the County's Road Classification Map and the Subdivision Regulations, however, the development would have been approved. (*See, e.g.*, T3. 143-45 (testimony of Planning, Zoning and Inspections Director Bradford Leonard); *see also* T3. 52, 67, 87, 97-100; *compare* Petition at 5 (implying without foundation that Gwinnett 316's proposed roads on the plat were "hazardous")).

(R. 480-83), Petitioners applied for permission to appeal to the Georgia Supreme Court. The Georgia Supreme Court granted the application based on the arguments and representations about the record contained in the Petitioners' application. After considering the facts as shown in the actual record, the Georgia Supreme Court affirmed the order of the trial court in full and declined to issue an opinion.[4]

Petitioners did not ask the trial court or the Georgia Supreme Court for a stay of the grant of the writ of mandamus until after their belated request for reconsideration was denied. The trial court subsequently ordered Petitioners to grant Gwinnett 316 its requested permit under threat of contempt, and Petitioners complied.

SUMMARY OF THE ARGUMENT

This Court should reject the request for a writ of *certiorari* to the Georgia Supreme Court for three reasons. First, the decision of the trial court expressly stated that it based its holding that the Subdivision Regulations were unconstitutional on the Georgia Constitution, which provides greater protection than provided under the United States Constitution. Therefore, the adequate and independent state law grounds doctrine applies, and this Court

[4] The portrayal of the record in Petitioners' application for discretionary review to the Georgia Supreme Court was as incomplete and misleading as the present Petition.

thus does not have jurisdiction. Second, even if the Georgia Constitution does not independently support the state courts' decisions, Petitioners failed to present any reasons for why exceptional circumstances exist for this Court to review the factual findings essential to the determination of the constitutional issues involved, and hence there is no reason for this Court to undertake a factual appellate review. Third, because the Subdivision Regulations effect a regulatory taking of Gwinnett 316's property interests as well as a physical invasion of its property, the state courts appropriately determined the Subdivision Regulations were unconstitutional under the Fifth and Fourteenth Amendments. Gwinnett 316 has been denied further development of its Property for five years even though the evidence demonstrated that the impact of its development was completely unrelated to the Loop Road. With respect to eighteen acres of right of way that Gwinnett 316 must forever reserve as an easement for the public, a regulatory taking has occurred, and a physical invasion was attempted. Additionally, the application of the Subdivision Regulations effected a regulatory taking of Gwinnett 316's previously approved development rights with respect to ninety additional acres surrounding the right of way.

REASONS TO REJECT THE PETITION

I. THE STATE COURT DECISIONS EXPRESSLY REST ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

This Court should not assume jurisdiction over this case because the state courts' decisions adequately rest on independent state law grounds. Under circumstances in which a state court has clearly and expressly rested its decision upon independent state law grounds adequate to support its holding, the Supreme Court will not assume jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Maller*, 296 U.S. 207, 210 (1935); *see generally Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991) (a principal purpose for which the Supreme Court uses its narrow certiorari jurisdiction is to resolve conflicts in federal law existing among the federal circuit courts of appeal or state supreme courts). When the state court decision subjected to scrutiny has specifically stated that it is based on adequate and independent state law grounds, this Court will not review the holding to determine whether it was an accurate interpretation of the state law implicated. *Klinger v. Missouri*, 80 U.S. 257 (1871).

Jurisdiction for a writ of certiorari is lacking. The trial court expressly held as follows: "[T]he Constitution of the State of Georgia offers its citizens greater rights and more benefits than does the federal constitution. . . ." (Order at 7, Petition App. "B" at 7a.)[5] Accordingly,

---

[5] *Cf. Grissom v. Gleason*, 418 S.E.2d 27, 29 n.1 (Ga. 1992) (overruling *Denton v. Con-Way Southern Express, Inc.*, 402 S.E.2d

because the trial court clearly stated its intention to rest its decision on the Takings Clause of the Georgia Constitution, the adequate and independent grounds doctrine applies. Notwithstanding the scope of the federal constitution, under Georgia cases interpreting the constitutional limits of local governments' planning powers, it is well established that when land use regulations take development rights without providing for the prior payment of compensation, the regulations are unconstitutional. *WMM Properties, Inc. v. Cobb County,* 339 S.E.2d 252, 255 (Ga. 1986); *see Lamar Advertising v. City of Albany,* 389 S.E.2d 1216 (Ga. 1990) (municipality could not take right to maintain pre-existing signs that were of a type in which the plaintiff specialized without compensating the plaintiff); *see also Inner Visions, Ltd. v. City of Smyrna,* 400 S.E.2d 915 (Ga. 1991) (owners were entitled to have business license issued under conditions in building code in existence at the time application was made).

In the instant case it is not disputed that Gwinnett 316 obtained approval of its plan to develop the Property in 1985, before the Subdivision Regulations were adopted and before the Road Classification Map showed the hypothetical Loop Road. Gwinnett 316 relied upon the 1985 approval in commencing to develop its Property for the

---

269 (Ga. 1991), but noting that although the equal protection clause of the Georgia Constitution is coextensive with the equal protection provisions in the Fifth and Fourteenth Amendments, there are numerous examples where the floor rights guaranteed by the federal constitution have been supplemented by additional guarantees contained in the Georgia Constitution).

purpose in which it specialized. The Subdivision Regulations not only destroyed the ability to develop the Property as originally approved, but also required the donation of more than eighteen acres of land without any form of compensation. (T3. 52). Therefore, the Subdivision Regulations do not survive the scrutiny of the Georgia Constitution.

II. PETITIONERS HAVE FAILED TO INDICATE ANY REASON FOR THIS COURT TO OVERRULE THE FACTUAL FINDINGS OF THE STATE COURTS.

This Court should reject the Petition because the trial court's factual findings support a holding that the Subdivision Regulations are unconstitutional. Specifically, the trial court found: (1) that the Loop Road was not related to or meant to service traffic generated by Gwinnett 316; (2) that the Loop Road was the type of major highway intended to alleviate general traffic problems in the County and the City; (3) that the real reason the City adopted the Subdivision Regulations was because it could not afford to build needed roads given the lack of available public funds; and (4) that the Loop Road not only would not service Gwinnett 316's traffic needs, but also the Loop Road's design and characteristics would destroy Gwinnett 316's use of the eighteen acres of right of way occupied by the Loop Road and would destroy the ability to develop over ninety additional acres. (Order at 5-6, Petition App. "B" at 5a-6a).

Although the findings of the state courts are not binding to the extent they undercut federal constitutional guarantees, this Court "customarily accept[s] the factual

findings of state courts in the absence of 'exceptional circumstances.' " *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97, 111-12 (1980) (quoting *Lloyd A. Fry Roofing Co. v. Wood,*, 344 U.S. 157, 160 (1952)). "Moreover, 'an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional questions.' " *Hernandez v. New York,* 111 S. Ct. 1859, 1870 (1991). Before Petitioners can attack the state courts' constitutional analysis, they must demonstrate that the facts dispositive of this case should be reviewed and reversed by this Court.

There are no "exceptional circumstances" justifying the rejection of the state courts' factual findings. *California Retail Liquor Dealers Ass'n.*, 445 U.S. at 111-12. Petitioners have not even argued that the trial court erred in making its factual findings given the testimony before it. Indeed, the facts considered by the state courts in analyzing the case under the decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, 837 (1987), established that traffic generated by Gwinnett 316's development would be wholly unrelated to the conditions imposed on Gwinnett 316 by the Subdivision Regulations. (Order at 7, Petition App. "B" at 7a.) For example, a traffic expert testified for Gwinnett 316 that existing roadways can be improved in the area with minor improvements to adequately serve Gwinnett 316's current and proposed development; that Gwinnett 316's development only generates 3% of the traffic volume on surrounding roads; that even with the future complete build-out of the development, Gwinnett 316 will not overtax surrounding roads; that

traffic using the development would not use Georgia State Highway 316, which Petitioners claim would become accessible, (Petition at 6); and that Gwinnett 316 does not use the surrounding roads when the roads experience their greatest strain from residential commuter, rush-hour traffic. (T1. 129-31 & 146-47.) Remarkably, the only testimony before the trial court supporting Petitioners' arguments came from a single witness – a policeman who was not a trained traffic engineer and who did not conduct any study of the traffic volumes to and from the development. (T3. 132.) Petitioners' disagreement with the trial court's rejection of the facts as Petitioners asserted them to be does not constitute exceptional circumstances.

III. THE STATE COURTS DID NOT ERR IN HOLDING THAT PETITIONERS HAD TAKEN GWINNETT 316'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioners cannot establish special or important reasons for granting the Petition as required under United States Supreme Court Rule 10.1. For example, Petitioners have failed to show that the Georgia Supreme Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10.1(b). Neither does the Petition demonstrate that the decisions of the Georgia courts in this case have "decided an important question of federal law which has not been, but should be, settled by this Court," or that the state courts have

"decided a federal question in a way that conflicts with the applicable decisions of this Court." U.S. Sup. Ct. R. 10.1(c).

There is no inconsistency in the application and understanding of what is an unconstitutional exaction of a property interest from a landowner wishing to acquire a development permit. The Supreme Court in *Nollan v. California Coastal Commission* cited more than twenty cases from various jurisdictions following the same analysis as followed by the state courts in this case and indicated that the constitutional boundaries for permissible government exactions are relatively clear. 483 U.S. 825, 839-40 (1987).

Given the relatively clear lines between a constitutional versus an unconstitutional exaction imposed on developers, there is no need to grant a writ of *certiorari*. Gwinnett 316 should not be singled out to bear the majority of the burden for improving the Loop Road to offset the increase in traffic occurring in the City. "One of the principal purposes of the Takings Clause is to 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This case is thus a straight-forward takings case. There is no question that under the federal constitution "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

An examination of this Court's takings jurisprudence further supports the rejection of the Petition. This Court has classified challenges to the exercise of governmental authority brought under the Fifth Amendment into two categories: (1) those cases in which the regulation denies all economically beneficial or productive use of the land and (2) those cases in which the physical invasion of the landowner's property interest has occurred. *Yee v. City of Escondido, California*, 112 S. Ct. 1522, 1526 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-28 (1978)). Gwinnett 316 argued to the state courts that Gwinnett 316's property interests in the eighteen acre right of way occupied by the Loop Road through the Property and in Gwinnett 316's ninety acres surrounding the right of way had separately been taken under either of the two categories. Regardless of which of the two analyses is applied to the facts of this case, the City's Subdivision Regulations take Gwinnett 316's land without compensation and in violation of the federal constitution.

A. The City's Subdivision Regulations Caused a Regulatory Taking of Gwinnett 316's Property Interests.

Petitioners have attacked the decisions of the state courts on the grounds that they allegedly failed to correctly apply the proposition that a land use regulation does not amount to a regulatory taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of his land. (Petition at 10 (citing *Penn Central Transp. Realty Co.*, 438 U.S. at 127, and

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)). The state courts, however, correctly analyzed this case under a regulatory takings framework.

1. The Subdivision Regulations did not substantially advance a legitimate state interest.

In *Nollan*, the Court analyzed whether the condition imposed "substantially advanced" a state interest under the Takings Clause of the Fifth and Fourteenth Amendments. 483 U.S. at 835; (*see* Order at 7, Petition App. B at 7a). The state courts correctly applied *Nollan* to the extent its facts are analogous in some respects to the facts of the instant case.

In *Nollan*, the land at issue was a beachfront lot located between a public park and beach to the north and another public beach to the south. On the lot sat a bungalow in a state of disrepair that the Nollans desired to replace. According to California law, the Nollans were required to obtain a permit to build on their property, and they submitted an application for approval to replace the existing bungalow. The governmental authority responsible for reviewing applications for development of beachfront property conditioned the grant of the Nollans' building permit upon the dedication of an easement to the public to pass across the property. *Nollan*, 483 U.S. at 827-29.

The circumstances in the instant case favor a finding of a taking of the eighteen acre right of way even more so than the circumstances at issue did in *Nollan*. This Court

in *Nollan* began its discussion with the following observation:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . "a mere restriction on its use," . . . is to use words in a manner that deprives them of all their ordinary meaning.

483 U.S. at 831. In the instant case, the Subdivision Regulations prohibit *all* building in the certain area of right of way shown on the Road Classification Map and hence impose an absolute, *per se* development restriction on eighteen acres of Gwinnett 316's land regardless of Gwinnett 316's proposed use of its surrounding land. Because a forced reservation of the Loop right of way has been imposed on Gwinnett 316, the right of way has been taken.

Assuming, *arguendo*, that a taking did not occur by reason of the forced reservation of the eighteen acres for public use, a taking of the surrounding land was still properly found based on the imposition of the condition of development of the surrounding acreage. Gwinnett 316 argued to the state courts that conditioning future development of the land surrounding the Loop right of way on the depiction of the right of way on Gwinnett 316's sketch plat was unconstitutional because the condition imposed

did not substantially advance a legitimate state interest. The Petitioners allege without basis that the City could have prohibited all development in the area of Gwinnett 316 in order to alleviate alleged public traffic and safety concerns allegedly caused by Gwinnett 316, and therefore they could require Gwinnett 316 to show the Loop Road right of way on the sketch plat as an alternative to prohibiting all development. Although the Court in *Nollan* noted that "[i]f a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which *accomplishes the same purpose* is not," the Subdivision Regulations do not accomplish a purpose that could be legitimately furthered by prohibiting development of the Property. 483 U.S. at 836-37 (emphasis supplied).

The state courts did not err in finding that the facts needed to meet the nexus required in *Nollan* were not present. The alleged alternative to totally restricting development – reserving the Loop Road on the sketch plat – was not imposed by Petitioners to serve the same purpose as a prohibition on Gwinnett 316's development. Rather, the purpose sought by the imposition of the sketch plat condition was to obtain a road designed primarily to service and alleviate traffic problems caused by the general explosion of commuter traffic in and around the City and County as a whole.

The decision in *Nollan* refuted the rationale advanced by Petitioners. The following statement in *Nollan* of the principles applicable to this case highlights the lack of a

nexus between the Loop and Gwinnett 316's development:

> The evident constitutional propriety disappears, however, if the *condition substituted* for the prohibition utterly *fails to further the end advanced as the justification* for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

483 U.S. at 837 (emphasis supplied).

"[U]nless the permit condition serves the same government purpose as the developmental ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' " *Nollan*, 483 U.S. at 837 (cit. omitted.) The state courts found as a matter of fact that Gwinnett 316 had been unjustly singled out to bear the burden of financing the Loop by a contribution of property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 166 (1980) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The financial limitations on the County and the City caused by the explosion of growth and the inability or unwillingness of the governments to adequately tax the population to support proposed public improvements were the reasons for requiring Gwinnett 316 to give up the Loop Road acreage. (Order at 5 n.5 & 5-6, Petition App. "B" at 5a n.5 & 5a-6a.)

Public officials actively contended that the Subdivision Regulations required Gwinnett 316 to donate the Loop Road acreage to the public. For example, George Black, the County's chief administrator of traffic and road planning, wrote a letter to Gwinnett 316 declining to purchase the Loop Road acreage because the Subdivision Regulations required it to be donated. (T3. 288; Plaintiff's Ex. "18".) Additionally, the factual findings of the Petitioners attached to the Petition as Appendix E reveal that the Subdivision Regulations serve the public purpose of obtaining free land for the development of a costly but sorely needed road that would alleviate the general increase of traffic in and around the City. (*See* Petition App. E at 26a; Order at 6, Petition App. "B" at 6a.) These facts support a finding that the exaction of the eighteen acres was not imposed for the purpose of alleviating problems caused by Gwinnett 316's development, but rather, that the right of way condition was imposed to alleviate general traffic problems in areas other than in and around the Property. The *importance* of the unrelated public welfare advanced by the building of the Loop does not justify the imposition of these conditions on Gwinnett 316, "but positively militates against the practice." *Nollan*, 483 U.S. at 837 n.5.

The exaction imposed on an owner of a property interest must be reasonably related to the burden on the public caused by the owner's utilization of public services. *See Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163 (state's retention of interest earned on money deposited into the court's registry was an unconstitutional taking

because the exaction of the fee was not reasonably related to the burdens and costs imposed on the courts by the suit.) The city "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.' *See* U.S. Const. Amdt. 5; but if it wants an easement across [Gwinnett 316's] property, it must pay for it." *Nollan*, 483 U.S. at 841-42.

2. The Subdivision Regulations deprived Gwinnett 316 of all economically viable use of its land comprising the eighteen acres of right of way and the surrounding ninety acres remaining to be developed.

The state courts also properly applied the second part of the regulatory takings analysis, providing that a taking in violation of the Fifth and Fourteenth Amendments occurs if a landowner is deprived of the economic value in its land by the application of the regulation. First, there is no doubt that the Subdivision Regulations deprive Gwinnett 316 of all viable economic use for the eighteen acres lying in the right of way. This Court's decision in *Lucas v. South Carolina Coastal Council* is applicable to the extent it stands for the proposition that the deprivation of the economic value in land effects a taking. 112 S. Ct. 2886, 2894 (1992). "[W]hen the owner of real property has been called upon to sacrifice *all economically beneficial uses in the name of common good, that is, to leave its property economically idle, he has suffered a taking.*" *Id.* at 2895 (additional emphasis supplied). In the instant case, there is no dispute that the City's Subdivision Regulations require Gwinnett 316 to leave an eighteen acre strip of right of why, bisecting the middle of its development,

fallow and undeveloped. Furthermore, because this acreage is part and parcel of the Property securing Gwinnett 316's mortgage, Gwinnett 316 is forced to continue paying interest and principal for the Property purchased in 1985 without having the right to economically use its land for any purpose whatsoever.

Although the City argued to the trial court that Gwinnett 316 still had the right to use the right of way land for "grazing," "grading" or, "clearing" purposes, these purposes are not viable options for Gwinnett 316 and were frivolously argued. Grading or clearing of the land is not a land use without the right to develop the land after it is graded and cleared and would only prepare the land for the public's use for the Loop. Also, grazing animals on the right of way land winding along the right of way acreage, which sits on a ridge top bisecting Gwinnett 316's industrial distribution warehouse development within the primary city in one of the fastest growing suburban areas in the United States, is not a viable use of the Loop Road acreage.

The state courts also found that the Subdivision Regulations deprived Gwinnett 316 of its use of over ninety additional acres surrounding the Loop Road. (Order at 5, Petition App. "B" at 6a.) The Loop Road would sit on a ridge winding through the development and as planned precludes the large sized warehouses in which Gwinnett 316 specializes. (*Id.*; T3. 52.) The road's elevation is such that the large trucks using the warehouses could not access the highway even if access were provided, which it is not. (Order at 5-6, Petition App. "B" at 6a; T1. 77-80; T3. 173-74 & 52.) Gwinnett 316 thus lost its use for these

ninety acres after the Subdivision Regulations were adopted and applied to it.[6]

B. The Subdivision Regulations Effect a Taking of Gwinnett 316's Land Under a Physical Invasion Analysis.

Not only do the facts of this case show a regulatory taking, but they would also support the finding of a taking of the eighteen acres of the right of way by physical invasion. *Cf. Yee v. City of Escondido, California,* 112 S. Ct. 1522, 1528 (1992) (rent control ordinance did not amount to physical invasion). A physical taking occurs where a landowner is required *"to submit to the physical*

---

[6] Given the destruction of Gwinnett 316's development wrought by the Subdivision Regulations, the decision in *Penn Central Transportation Co.*, cited by Petitioners, is factually inapposite to the facts of the present case. 438 U.S. 104. In *Penn Central,* there was no conditioning of further development upon the dedication of a property interest to the public, *id.*; the property rights affected by the New York City law at issue could be transferred to the neighboring parcels, *id.* at 137; the governmental authority had not denied the owner of the property the right to occupy the air space above the terminal as a whole, but only the right to build a particular size structure in a 50-story air space, *id.* at 136-37; the rights at issue did not involve the owner's right to use a whole physical part of the acreage of the land, but rather focused on a segment of the bundle of property rights that were appurtenant to the physical acreage (the air space), *id.* at 130-31; the owner's property was not singled out arbitrarily for less favorable treatment than neighboring property as present in the instant case, *id.* at 132; and the regulations at issue did not interfere with the present uses of the property as is true in the instant case, *id.* at 136.

occupation of his land." Id. (Emphasis supplied.) The application of the Subdivision Regulations requires as a condition of development or permit approval that Gwinnett 316 reserve the Loop Road acreage exclusively for public use and dedicate the right of way to the City or County without compensation. Gwinnett 316 cannot build in the Loop right of way under the Subdivision Regulations in any circumstances; it must reserve the right of way on the sketch plat submitted for approval to the public, and it must dedicate the acreage forever to public use.

Under Georgia law, the City's Subdivision Regulations have been applied to attempt to force the dedication of an easement for road purposes to the public. The simple act of platting land pursuant to an ordinance and publicly filing the plat can constitute a completed dedication of an easement to the public for future rights of way shown on the plat. *Kinney v. Brown*, 216 S.E.2d 798 (Ga. 1975); *see Griffith v. C&E Builders, Inc.*, 200 S.E.2d 874 (Ga. 1973) (platting of streets pursuant to similar Gwinnett County Subdivision Regulations created easements in the public and in the purchasers of subdivision lots). This rule applies whether or not the governmental authority has graded or cleared the right of way land. *Kinney*, 216 S.E.2d at 798. The dedication of an easement to the public occurs as a matter of law. *See Northpark Assocs. No. 2 v. Homart Dev. Co.*, 414 S.E.2d 214 (Ga. 1992) (county's subjective testimony regarding the character of its rights in such roadways was irrelevant). Thus, the public would physically occupy an easement in the right of way for the Loop Road as a legal consequence of Gwinnett 316's reservation of the right of way on the plat.

The categorical distinction based on the physical invasion/regulatory takings classifications of cases rests partly on the temporal concept of the length of the occupation of the space invaded by the government. *Lorreto*, 458 U.S. at 427. While a temporary occupation of land may not be a taking, it is a taking, however, when the physical character of the land is occupied without temporal limitation. *Id.* at 427-28. "[T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand. A regulatory taking on the other hand, is based on a regulation 'that merely restricts the use of property.' " *Id.* at 430. By forcing Gwinnett 316 to do an act that amounts to the forced dedication of the eighteen acres of right of way, the City has taken the whole bundle of rights with respect to these eighteen acres, and even the City may not disclaim the effect of the dedication. *Kinney*, 216 S.E.2d at 799. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (imposition of navigational servitude for public use constituted a taking even if it only amounted to the required dedication of an easement).

CONCLUSION

For the foregoing reasons, Respondent Gwinnett 316 Associates respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

RICHARD W. WILSON, JR.*
JOEL L. LARKIN
PETERSON DILLARD YOUNG
SELF & ASSELIN
Suite 1100
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 523-3300

Counsel for Respondent

*Counsel of Record